JC & MC SDN BHD & ANOR

v.

MATAD SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[SUIT NO: S2-24-238-1997]
17 DECEMBER 1997

CONTRACT: *Sale and purchase of land - Right to enter into joint venture agreement - Whether 2nd plaintiff had right to dispose undivided share - Whether defendant had right to withhold consent - Whether silence as to consent invoked deeming clause*

LAND LAW: *Sale of Land - Transfer of one-half undivided share of land - Whether contravened s. 214(1)(b) of National Land Code 1965*

PARTNERSHIP: *Duties - Good faith - Joint venture - Whether partnership laws applicable - Whether defendant was partner of 2nd plaintiff - Whether defendant had fiduciary duty towards 2nd plaintiff - Whether defendant had acted in good faith*

The defendant and the plaintiff entered into a sales and purchase agreement ('SPA'), whereby it was provided that in the event of the defendant's failure to pay the 4th and final payment the plaintiff could enter into a joint venture agreement ('JVA') with the defendant, on an equal basis. It was a term of the SPA, that the plaintiff could nominate a party to be assigned the benefits of the provisions of the SPA and to this end the 2nd plaintiff was nominated by the 1st plaintiff to be the assignee.

One of the terms of the JVA provided that either party could dispose of its one-half undivided share and that the other party on being informed of the particulars of the intended transaction would consider the matter in good faith and if no reply was given within 21 days of receipt of the notification, it would be deemed that consent was given. A further term of the JVA provided that the land could be transferred to a joint venture company ('JVC'), both parties holding equal shares, for the purpose of developing the land.

The 2nd plaintiff notified the defendant by letter of its intention to dispose of its one-half undivided share, providing the particulars of the intended purchaser. The defendant replied within 21 days informing the 2nd plaintiff of the non-payment of quit rent and stamp duty but nothing was said about the intended sale. The question then was whether the failure to give consent

to the sale of the one-half undivided share of the land brought the deeming clause of the JVA into play. The defendant submitted that there were insufficient particulars of the intended purchaser given and in particular it argued that the sale of the plaintiff's undivided half-share of the land contravened s. 214(1)(b) of the National Land Code 1965 ('NLC').

Held:

[1] In a relationship relating to partnership business, utmost good faith is due from every member of the partnership towards every other member, and if any dispute arises between partners touching on any transaction by which one seeks to benefit himself at the expense of the firm he will be required to show not only that he has the law on his side, but that his conduct stands by the highest standard of honour. (*Vasu Devan & Ors v. VA Nair* [1985] 1 CLJ 160). It is recognised by the decisions of the court that there are classes of persons who normally stand in a fiduciary relationship to one another and one class is that of partners.

[1a] As the defendant and the 2nd plaintiff had been involved in the JVA for an intended commercial venture, they were deemed to be partners and the law relating to partnership would apply. Consequently, a fiduciary duty would be imposed upon the defendant in the defendant's exercise of its consideration of the 2nd plaintiff's notice of intention to dispose of its half undivided share in the land. Good faith could only be shown to have been exercised by the defendant if he had given due and proper consideration of the intended sale. However, the defendant had given no plausible reason for its failure to give consent within the required 21 days.

[2] The NLC confers upon a registered proprietor the right to deal with his land whether in whole or in part. He may lease part of his land under s. 221 of the NCL or if he is a registered co-proprietor he is at liberty to transfer under s. 214(1)(b) or to charge under s. 241(1)(b) the whole of his undivided share in his land or he may grant an easement over a portion of the servient land.

[2a] The defendant did not direct any objection towards the prospective purchaser within the required 21 days and as a result the deeming provision of the JVA had come into play, in that the defendant was deemed to have given his consent. In the circumstances, the argument that s. 214(1)(b) of the NLC would be infringed, was not tenable and therefore devoid of merit.

[Plaintiffs' application allowed.]

Cases referred to:
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 ***(refd)***
Hospital Products Ltd v. United States Surgical Corp & Ors [1984] 154 CLR ***(refd)***
Peter Lai Khee-Chin & Anor v. Collector of Stamp Duties [1973] 2 MLJ 33 ***(refd)***
Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors [1997] 2 CLJ 607 ***(refd)***
Vasu Devan & Ors v. VA Nair [1985] 1 MLJ 137 FC ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 214(1)(b), 221, 241(1)(b)

For the plaintiffs - YM Chin (D Nair with him); M/s Nik Saghir & Ismail
For the defendant - LS Ng; M/s Sothi & Ang

Reported by Michele Saw

JUDGMENT

RK Nathan JC:

By an agreement dated 8 October 1990 the 1st plaintiff purchased from the National Land Finance Corporative Society Ltd (NLFC) some 448.024 acres of land situated in the Mukim of Serendah, District of Ulu Selangor (the said land). Pursuant to a sale and purchase agreement dated 1 July 1991 (the SPA) the 1st plaintiff agreed to sell the said land to the defendant for a sum of RM42,562,280. Clause 11 of the SPA reads:

> 11. In the event the Purchaser shall decide not to make payment on the Fourth and Final payment then the Vendor shall be entitled absolutely to enter into a Joint Venture Agreement (hereinafter called "the Joint Venture Agreement") with the Purchaser on a Fifty-Fifty (50-50%) per cent basis, in lieu of the payment referred to in Clause 4 above.

The defendant only paid half the purchase price, thereby bringing into play cl. 11 of the SPA. Since cl. 25(a) of the SPA envisages the entitlement of the 1st plaintiff to nominate a party to be the assignee of the benefits of the provisions of the SPA, the 1st plaintiff nominated the 2nd plaintiff as the assignee in respect of the benefits falling under the SPA and in particular under cl. 11 thereof. On this basis the 2nd plaintiff entered into a joint venture agreement (JVA) with the defendant dated 23 April 1993. The relevant clauses of the JVA are reproduced.

Clause 1 reads:

> Notwithstanding that the said Land is presently registered only in the name of MATAD, MATAD hereby declares that both PERDANA and MATAD are joint owners of the said Land in equal proportions and that MATAD holds the said Land as trustee for PERDANA in respect of the one half (1/2) undivided share in the said Land and any interest in or benefit arising from the said Land (hereinafter collectively referred to as "PERDANA'S Beneficial Interest").

Clause 4 reads:

4. It is the understanding of the parties hereto that the said Land may be:-

(a) disposed of to any purchaser at a price acceptable to both parties hereto, in which case the net profit arising therefrom, after deducting all expenses incurred thereby and any tax payable thereon, shall be shared equally between the parties hereto; or

(b) transferred to a company in which both parties hereto have equal shares (hereinafter referred to as "the Joint Venture Company"), in which case PERDANA hereby agrees to be solely responsible for all expenses in connection with such transfer including the payment of real property gains tax or any other tax that may be payable arising from such transfer."

Clause 5 reads:

5. In the event the said Land is transferred to the Joint Venture Company pursuant to Clause 4(b) above, the parties hereto agree that the Joint Venture Company develop the said Land or part thereof into a viable project acceptable to both parties hereto, PROVIDED THAT the said Land or part thereof may be used as security for any loan required to finance the project."

Clause 6 reads:

Notwithstanding Clause 4 above, it is hereby agreed that any party hereto shall be entitled to dispose of its one half (1/2) undivided share in the said Land in any manner and at market price and with the consent of the other party to any purchaser. Any expenses incurred and any tax payable arising from such disposal shall be borne solely by the party disposing of his one half (1/2) undivided share.

Clause 7 reads:

In the event any of the parties hereto (hereinafter referred to as "the Proposer") has found a purchaser willing to purchase its one half (1/2) undivided share in the said Land it shall notify the other party of the particulars of the said purchaser with the view to obtaining the other party's consent and the other party shall without undue delay consider the matter in good faith; PROVIDED THAT if no reply from the other party is received by the Proposer within twenty one (21) business days of receipt by the other party of the said notification, it shall be deemed that the other party has given its consent to the sale of the Proposer's one half (1/2) undivided share of the said Land to the purchaser and the Solicitors are hereby authorised to release the Memorandum of Transfer to PERDANA to effect the transfer. The notification referred to in this Clause shall be in writing and shall be sufficiently served

by the Proposer on the other party by registered letter addressed to the other party at the address stated herein and shall be deemed to have been received by the other party in the ordinary course of post.

Clause 10 reads:

10. All the outstanding and future quit rents payable in respect of the said Land and the drainage costs and expenses relating to the development of the said Land, shall be borne equally by the parties hereto.

Pursuant to cll. 6 and 7 of the JVA, arising out of the 2nd plaintiff's desire to dispose of its half undivided share in the land, the 2nd plaintiff, by letter dated 26 October 1994 wrote to the defendant seeking the defendant's consent for the disposal of its half share in the said land. In the said letter the 2nd plaintiff disclosed the name of the company, being the prospective purchaser, and also disclosed the names of the directors of the said company, thus complying with the requirement of cl. 7 of the JVA.

Insufficient Particulars Of Prospective Purchaser, Tasik Bayangan Sdn Bhd

The defendant on the other hand contended that insufficient details had been provided. This issue can be quickly put to rest. If the defendant was of the view that insufficient details of the intended purchaser had been provided, the defendant could and ought to have asked for more information as to the standing of the intended purchaser. In any event, the defendant could have easily caused a search to have been made at the Registrar of Companies to ascertain the true financial standing and track record of the intended purchaser.

Defendant's Reply

The defendant replied by its letter dated 11 November 1994, exh. TSA5 to encl. 1, and merely touched on two issues, namely:

(a) That the 2nd plaintiff did not contribute to any stamp duty for the transfer and as such the 2nd plaintiff is liable to pay the plaintiff the sum of RM240,200.

(b) That the 2nd plaintiff has failed to settle its portion of the quit rent for the years 1992 - 1994 and that the 2nd plaintiff would be required to pay 10% interest on the arrears of quit rent and stamp duty.

Whilst replying within the 21 days as was required by cl. 7 of the JVA, the defendant had not in any way whatsoever, touched upon the reputation, financial standing or any other aspect of the corporate character of the intended purchaser. Exhibit TSA12 to encl. 1, being the affidavit filed in support of the application, shows that the 2nd plaintiff has settled all arrears of quit rent

together with the 10% interest as requested. Enclosure 5 being the further affidavit confirms the fact that the 2nd plaintiff has paid its share of the contribution for quit rent for the current year. In its affidavit in reply (encl. 4) the defendant had made no reference to the issue as to the 2nd plaintiff's liability to contribute the sum of RM240,000 representing the 2nd plaintiff's share in respect of stamp duties payable. Even if there was delay on the part of the 2nd plaintiff to pay its share of the quit rent, the defendant had never in any letter raised this as an issue. Further, even if the defendant was of the view that the settlement of all overdue quit rents was to be a condition precedent to be satisfied before consent was given, the defendant had not said so in any of its letters. The defendant is estopped by conduct from raising these issues now. Besides, the defendant can easily sue for the sums due, as non payment of quit rent and stamp duty charges.

Can The Defendant Now Raise The Issue Of The JVA, Namely Cll 4 and 5

Since the defendant had by way of its letter dated 11 November 1994 merely touched on the twin issues which I had adverted to earlier and had not raised the issue of the joint venture in that said letter I hold that it is improper for the defendant to now raise cll 4 and 5 of the JVA outside the 21-day period which is the period specified in cl. 7 for due consideration to be given.

Deeming Provision In Cl 7

Taking into consideration the manner in which the defendant replied raising only two issues in its letter dated 11 November 1994 and by not directing any objections towards the prospective purchaser, Tasek Bayangan Sdn Bhd, within the required 21 days, it is my judgment that the deeming provision of cl. 7 has come into play and that the defendant is deemed to have given his consent. Notwithstanding the fact that the applicability of the deeming provision plays a prominent role in landlord-tenant situations, whereby a landlord is required to give consent to the assignment of tenancy rights, it is my judgment that the principle can equally be applied to this case.

Partnership Law To Apply

It is my judgment that since the defendant and the 2nd plaintiff have been involved in the JVA for an intended commercial venture, they are deemed to be partners in the JVA and as such the law relating to partnership must apply. Clause 7 of the JVA expressly states that the party from whom consent is sought, "shall without undue delay consider the matter in good faith". The question then arises as to whether in the circumstances of the case, the defendant had wilfully withheld his consent to the 2nd plaintiff assigning its half undivided share. Good faith can only be shown to have been exercised

by the defendant if the defendant had given due and proper consideration, having regard to the circumstances of the case. In the case of *Vasu Devan & Ors v. V.A. Nair* [1985] 1 MLJ 137 FC the then Federal Court held in relation to a partnership business that utmost good faith is due from every member of a partnership towards every other member and if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.

It follows as a natural consequence that since I have found that there is a partnership relationship existing between the 2nd plaintiff and the defendant there would therefore exist a fiduciary imposed upon the defendant in the defendant's exercise of its consideration of the 2nd plaintiff's application for disposal of its half undivided share in the said land. I am fortified in my view in upholding the existence of a fiduciary duty when I refer to *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd. Latiff bin Shah Mohd & Ors* [1996] 2 MLJ 265. Gopal Sri Ram JCA in delivering the decision of the Court of Appeal said at p. 295:

> Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function.

Further, the Court of Appeal relied on a passage from Gibbs CJ in the case of *Hospital Products Limited v. United States Surgical Corp & Ors* [1984] 154 CLR wherein his Lordship said at p. 68:

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognised by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another – eg, partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed.

The defendant has given no plausible reason for its failure to give its consent within the required 21 days although its reply within the 21 days raised other issues relating to non-payment of stamp duty and quit rent. Besides, the defendant's contention that the 2nd plaintiff in all its letters requesting consent had not at any time disclosed the purchase price nor furnished a valuation

report, is totally without merit because there is no provision in cl. 7 of the JVA for the 2nd plaintiff to provide so.

Section 214(1)(b) Of The National Land Code 1965

The defendant argued that the 2nd plaintiff's letter requested consent for a transfer of its undivided half share. Referring to s. 214 of the NLC which reads:

> 214. What may be transferred, and restrictions on exercise of powers.
>
> (1) Subject to sub-section (2), the following shall be capable of transfer under this Act -
>
> ...
>
> (b) the whole, but not a part only, of any undivided share in alienated land;

the defendant submitted that this sub-section would operate to disallow the transfer of the plaintiff's undivided half share.

On the face of it cl. 6 of the JVA may appear to infringe s. 214 of the NLC. However in *Peter Lai Khee-Chin & Anor v. Collector of Stamp Duties* [1973] 2 MLJ 33 the applicant effected a transfer of the piece of land which was originally registered in his name whereby he transferred the whole of the interest in the said land to his wife and himself in undivided shares. As a result of that transfer undertaken in the said manner an issue regarding stamp duty was raised which is not relevant to the present case. The transfer undertaken by Peter Lai whereby he transferred the whole land to himself and to his wife in undivided equal shares was not held to be void pursuant to s. 214 of the NLC. The court held that it did not infringe s. 214(1)(b) of the NLC. Since consent of the defendant is deemed to have been given the argument that s. 214(1)(b) of the NLC would be infringed is no longer tenable. In any event I am bound by the Federal Court decision in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 3 AMR 2103 where Edgar Joseph Jr FCJ said at p. 2120:

> To take our discussion further, the Code confers upon a registered proprietor the right to deal with his land either in whole or in part; for example, he may lease part of his land (s. 221) or, if he is a registered co-proprietor, he is at liberty to transfer (s. 214(1)(b) or to charge (s. 241(1)(b)) the whole of his undivided share in his land or he may grant an easement over a portion of the servient land. (See Part Seventeen, Chapter One of the Code.)

In the circumstances that argument that s. 214(1)(b) precludes the transfer is devoid of merit.

In the circumstances, I granted the plaintiff the following orders:

(i) A declaration that the defendant is deemed to have given his consent to the 2nd plaintiff allowing the 2nd plaintiff to sell its half (1/2) undivided share in the lands held under Grant 34712 Lot 4454, Grant 34713 Lot 4455, Grant 34715 Lot 4456, Grant 34709 Lot 4458, Grant 34719 Lot 4460 and Grant 34717 Lot 1960, Mukim Serendah, Daerah Ulu Selangor which is presently registered in the name of the defendant (hereinafter referred to as the said half undivided share) to Tasik Bayangan Sdn Bhd.

(ii) In the alternative, an order instructing the defendant to give its consent to the 2nd plaintiff to sell its said half undivided share to Tasik Bayangan Sdn Bhd.

(iii) A further order instructing Messrs R.R. Sethu, who are presently the stakeholders of the title deeds of the lands held under Grant 34712 Lot 4454, Grant 34713 Lot 4455, Grant 34715 Lot 4456, Grant 34709 Lot 4458, Grant 34719 Lot 4460 and Mukim Serendah, Daerah Ulu Selangor (hereinafter referred to as the said Lots) and the completed transfer forms for the said Lots and for Grant 34717 Lot 1960 to hand over the said documents to the plaintiffs' solicitors to enable the plaintiffs to transfer their half (1/2) undivided share to Tasik Bayangan Sdn Bhd.

(iv) A further order instructing the defendant to surrender to the 2nd plaintiff the title deed for the land held under Grant 34717 Lot 1960.

(v) Costs of this application to be borne by the defendant.

On reflection, I ought not to have granted prayer (ii) since it is superfluous.